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April 17, 1995
HAND DELIVER

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Abraham Lincoln Foundation
for Public Policy Research, Inc.;
Comments in Opposition to Proposed
Initiatives to Facilitate Minority
and Female Ownership;
MM Docket Nos. 94-149 and 91-140

Dear Sir:

Enclosed for filing are the original and nine copies of the Comments of the Abraham Lincoln Foundation in Opposition to Proposed Initiatives to Facilitate Minority and Female Ownership in the above-referenced dockets.

The Comments are submitted pursuant to the instructions in the Notice of Proposed Rulemaking (FCC 94-323). As you can see, there are sufficient copies for each Commissioner to receive a personal copy, and we would ask you to distribute one to each Commissioner.

Thank you for your assistance in this matter.

Sincerely yours,

William J. Olson

WJO:mm
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 94-323

In the Matter of	)	
	)	MM Docket Nos. 94-149
Policies and Rules Regarding	)	and 91-140
Minority and Female Ownership of	)	
Mass Media Facilities	)	

COMMENTS OF
THE ABRAHAM LINCOLN FOUNDATION
FOR PUBLIC POLICY RESEARCH, INC.
IN OPPOSITION TO PROPOSED INITIATIVES
TO FACILITATE MINORITY AND FEMALE OWNERSHIP

Executive Summary

In its Notice of Proposed Rule Making (FCC 94-323), adopted December 15, 1994, and released January 12, 1995 (hereinafter also referred to as "NPRM"), the Federal Communications Commission ("FCC") seeks "to explore ways to provide minorities and women with greater opportunities to enter the mass media industry." The FCC's stated purposes are to maximize "the diversity of points of view available to the public," and to provide increased economic opportunity.

Although the FCC has had various policies favoring minorities in effect since 1978, the Notice of Proposed Rule Making is silent as to the effectiveness of such policies in achieving programming diversity. In fact, the proposal for additional race-, and now gender-based, discriminatory policies appears to admit that the FCC's existing discriminatory policies have had little, if any, success in obtaining either increased minority ownership of broadcasting facilities or greater programming diversity. But rather than moving past its mistakes

and adopting policies to establish the color-blind government the American people desire, the FCC's remedy for past unsuccessful and wrong-headed policies is more of the same.

The FCC theorizes that policies preferring women and minorities will lead to more diversity in programming. But the FCC has never specified what type of new programming would justify race and gender discrimination, nor has there been any demonstration of greater program diversity having been achieved through such discriminatory practices in the past.

The proposed rule making should be withdrawn. Any final rules emanating from this proceeding would only exacerbate the unfair, discriminatory, and unconstitutional policies that now exist or have previously been attempted in FCC programs. While the FCC still exists, it should fundamentally rethink its policy in this area, and then determine to treat all persons on a color-blind basis.

Statement of Interest

The Abraham Lincoln Foundation for Public Policy Research, Inc. (hereinafter "Abraham Lincoln Foundation") is a nonprofit corporation established under the laws of the Commonwealth of Virginia in 1988. Its primary purpose is to promote the social welfare through informing and educating the public and government officials on issues related to the foundational principles of the

American republic.

The Abraham Lincoln Foundation, and its more than 80,000 members and supporters throughout the United States, have a special interest in issues of concern to black and minority populations, including support for the free enterprise system, back-to-basics education, enforcement of the constitutional, statutory and judicial protection of persons and property, and the promotion of traditional family values. Since its inception, the Abraham Lincoln Foundation has taken an active role in educating the public and government officials on many troublesome policy questions raised by the government's misguided efforts supposedly to remedy the effects of past racial discrimination by intentionally discriminatory policies and programs. The Abraham Lincoln Foundation has opposed misguided "affirmative action" government policies based on its fundamental belief that government should treat its citizens on a color-blind basis.

The Abraham Lincoln Foundation now submits these comments to advance its view that the minority-preference policies of the FCC, including those now in existence as well as those proposed, mock the Constitutional guarantees of equal protection of the law and are antithetical to the achievement of a color-blind government.

Background

Proponents of FCC discrimination point out that it can be established statistically that certain minorities historically have been underrepresented in the ownership and operation of various mass media, including broadcast, wireless cable, and low-power television and radio. Even if this were demonstrated, however, the FCC, which has outlived its usefulness, has not determined that such underrepresentation resulted from any racially discriminatory practices. Thus, the FCC could not and has not even attempted to, justify its minority preference policies on the theory that they are necessary remedial measures undertaken to cure the effects of past discrimination. Rather, the FCC's discriminatory policies have been rationalized on the theory that they will promote a different governmental goal – program diversity in mass media broadcasting. This justification does not withstand scrutiny.

Paradoxically, the FCC's official pronouncements, since at least 1969, have given lip service to an official policy of non-discrimination and equal opportunity in its treatment of all licensees and permittees. Nonetheless, any efforts to actually implement a policy of non-discrimination were abandoned long ago in favor of policies of intentional racial discrimination. In 1978, the FCC gave a new interpretation to a comparatively obscure provision of the Internal Revenue Code, Section 1071. This section accords very generous tax treatment to the seller of

a radio or television station, or a cable system, if the FCC certifies that the sale of that station, or system, is "necessary or appropriate" to further FCC policies.

Section 1071 was enacted in 1943 to protect radio station owners forced to sell their stations due to FCC policies prohibiting ownership of more than one station in the same market. It was designed to apply only to sales forced by the FCC's multiple ownership rules. However, in 1978, the FCC announced a new policy, offering tax certificates to owners who voluntarily sell their radio or television stations, later expanded to include cable systems and personal communications services, to a minority individual or a minority-controlled company. The theory has been that if more minorities were to own broadcast or cable facilities, there would be greater "diversity" in programming. (The theory, of course, has no possible application to personal communication services.) With the FCC's tax-certificate policies, Section 1071 is the only provision in the Internal Revenue Code that allows tax benefits simply because of an individual's race.[1]

These FCC policies could never be justified as assisting the poor, as they are totally unsuited to the goal of increasing economic opportunity. Radio and especially television stations

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[1] See Permanent Extension of Deduction for Health Insurance Costs of Self-Employed Individuals, House Report No. 104-32, 104th Cong., 1st Sess. (1995), p. 15.

are very valuable properties. No one – regardless of skin color – who lacks substantial capital can afford one, even with the aid of a minority-preference deal. The poor do not own broadcast properties. Therefore, the effect of the FCC policies is to favor some wealthy purchasers (or persons acting on behalf of wealthy purchasers) over other wealthy purchasers.

If only the well-off benefit, who loses? American taxpayers certainly lose. Individual FCC-approved tax certificates have permitted hundreds of millions of dollars in tax-avoidance. The total financial cost of this program to the American people is unknown, as the FCC keeps no data on the economic impact of this subsidy to the wealthy. However, the tax certificates certainly are making a substantial contribution to our nation's continuing deficits.

For example, in January, 1995, Viacom International, Inc. announced plans to sell its vast cable system for $2.3 billion. Its chairman and principal owner, Sumner Redstone, ranks fourth on "The Forbes Four Hundred" list of the richest Americans, with an estimated net worth of $5.6 billion (exceeded only by Warren Buffet, Bill Gates, and John Kluge). The profit on the Viacom sale is estimated to be well over $1 billion.

Mr. Redstone seems reasonably well off, but Viacom nonetheless has asked the FCC to grant a special favor tied to

skin color. Viacom is being acquired by a syndicate nominally controlled by black lawyer Frank Washington, who helped craft the FCC's minority-preference policy while serving as a member of President Carter's Administration. Viacom would ordinarily owe taxes of $500 million or more on the profit, payable in the year of the sale. But the FCC tax certificate policy will allow those taxes to be postponed indefinitely, because of the way a group of shrewd businessmen have set up a $2.3 billion deal, and not because the sale helps disadvantaged minorities or "maximizes the diversity of points of view available to the public." NPRM, p. 2.

According to published reports,[2] Mr. Washington is putting only $1 million of his own money into the deal, or four-tenths of one percent of the purchase price. His contract gives him the right to later sell his interest for a guaranteed $2 million profit after a short holding period. The Viacom sale is causing the FCC some well-deserved embarrassment, and resulted in the U.S. House of Representatives' approval of a bill that would repeal FCC authority in this area. However, Viacom is only the latest in a long series of abuses evidenced in recent press accounts:

- Anil Gajwani, an immigrant from India, became a self-made

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[2] See "Viacom to Get Big Tax Break in Cable Deal," Washington Post, January 4, 1995, p. A1; "Jim Crow in New Clothes?" Washington Times, February 6, 1995, p. A16.

millionaire in America through Insta-Check Systems, a check-verification firm. In late 1994, he acquired a license to operate a two-way paging system in an FCC auction for $8 million, while others paid up to $19 million. The discount was due solely to his status as a minority. Though Mr. Gajwani reportedly intended to operate the system himself, telecommunications giants were immediately vying to buy him out for market prices.[3]

- In 1994, Adelphia Communications set up a partnership with the name Page Call. Lisa-Gaye Shearing was recruited as a partner, under an agreement that requires her to put up absolutely no capital. "They thought I would be a good partner," she says. By making Ms. Shearing a nominal owner of Page Call, Adelphia received a 40 percent discount in its $53 million bid for several two-way paging licenses, under FCC policies favoring firms "owned" by women.[4]

- Harvey Gantt was the Democratic candidate for the U.S. Senate from North Carolina in 1990. In 1985, while mayor of Charlotte, Mr. Gantt was part of a group that acquired a license for a new television station license. His investment was $680, made possible by the FCC's minority-preference policies, designed to create opportunities for minorities to enter broadcasting and thereby bring about greater programming diversity. A few weeks

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[3] "Checkmate," Forbes, January 16, 1995, p. 106.

[4] "Front Woman," Forbes, January 16, 1995, p. 106.

later, without having broadcasted a single day, the group resold the license to white investors. Mr. Gantt's share of the sale proceeds was $470,000.[5]

- Jack Kent Cooke is the wealthy owner of the Washington Redskins football team. In 1990, he used the FCC tax certificate policy to sell cable television systems in several states for $600 million to a syndicate consisting of Falcon Cable TV, one of the largest cable system owners in the country, and six minority investors. After a short holding period, the minority partners, who had invested very little, sold their interest to Falcon at a large profit, and Falcon is now running the cable system without them.[6]

- Clarence McKee is a black lawyer who previously worked at the FCC. Using the FCC tax certificate policy, Mr. McKee and a white partner, George Gillett, owner of Gillett Broadcasting, purchased a Tampa television station for $365 million. The tax certificate saved the seller an estimated $100 million in taxes. Mr. McKee put $390 into the deal. He then sold his interest to Mr. Gillett for a profit of $1 million.[7]

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[5] "What's Really Fair," Time, November 19, 1990, p. 124; "White Mischief," The New Republic, December 10, 1990, p. 9.

[6] "FCC Minority Program Spurs Deals - and Questions," Washington Post, June 3, 1993, p. A1.

[7] "FCC Minority Program Spurs Deals - and Questions," Washington Post, June 3, 1993, p. A1; "How the Rich Get Richer," Forbes, May 15, 1989, p. 38.

• J. Bruce Llewellyn is a wealthy black businessman, who with Julius ("Dr. J") Erving controls Philadelphia Coca-Cola Bottling Co. He joined with other wealthy blacks, including O.J. Simpson and Bill Cosby, to buy a Buffalo television station under the FCC tax certificate policy for $65 million. Largely because of the tax breaks, the sellers turned down a $91 million offer from non-minority investors.[8]

• George Gillett (mentioned above) sold his Nashville television station to New York-based Whitcom Partners and a group of Alaska Eskimos. Again, the reason for the sale was enormous tax breaks. There is no evidence that the oil-rich Eskimo investors diversified the programming available to television viewers in Nashville by introducing Eskimo-oriented shows for its Tennessee audience.[9]

• Commercial Realty St. Pete, whose chief operating officer is St. Petersburg businessman James C. Hartley, was the winner last year in an FCC auction of interactive video licenses. The firm obtained a license worth $40 million for $33 million, taking advantage of the FCC's 25 percent discount for female-owned companies. Later, it was disclosed that the female "owner" was Teresa Hartley, James Hartley's wife. Mr. Hartley was quoted as

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[8] "How the Rich Get Richer," Forbes, May 15, 1989, p. 38.

[9] "How the Rich Get Richer," Forbes, May 15, 1989, p. 38.

saying, "She plays a major role. A lot of women are wives."[10]

These deals benefit non-minority sellers, who can save taxes, non-minority buyers, who can receive discounted prices reflecting a split of the tax savings, and the minority investors, who can make large gains on what are essentially risk-free investments. But there is no evidence that these policies benefit the American people, or any legitimate government policies.

ARGUMENT

The Abraham Lincoln Foundation opposes adoption or implementation of any raced-based preferences for the following reasons.

1. The FCC's policies designed to increase minority ownership of mass media facilities by race preference are misguided, and should be abandoned.

The FCC's race-preference policies are not only ineffective – as the FCC itself appears to admit (NPRM, p. 5) – they are fundamentally wrong. Even if they are intended to achieve what some believe is a permissible government objective (i.e., increased minority ownership and diversity of programming), they attempt to do so through perverse means, predicated upon racial preferences. It is respectfully submitted that the FCC should

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[10] "Color TV: Diversity-Mongering at the FCC," The New Republic, December 19, 1994, p. 9.

abandon those means, as contrary to the fundamental principles of equality and non-discrimination.

Instead, the FCC now seeks to expand its preference policies, ostensibly to more effectively achieve the goal of diversity in programming. Although it seeks public comment on its proposals, the slant of the proposals – further race and gender-based discrimination in FCC policy – is clearly evident. Yet, the FCC has failed to address why its pursuit of a vague objective known as "diversity of programming" is sufficient to justify racial discrimination.

The Supreme Court at one point reviewed certain of the FCC's race-driven policies in Metro Broadcasting, Inc. v. FCC, 495 U.S. 547 (1990). But that decision – which was based upon certain factual assumptions which are no longer valid (see pp. 23-24, infra) – is not carte blanche for the FCC to expand and embellish federally-funded racial discrimination, and does not mandate such policies.

While it is still in existence, the FCC should take a stand against discriminatory policies and take the lead in establishing a color-blind government – to return to the original meaning of affirmative action almost now forgotten.[11] Few now remember

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[11] The FCC also adopted preference policies favoring females over males in considering broadcast licenses, although those policies were later invalidated by the United States Court of

that "affirmative action" originally meant color-blind treatment. In March 1961, President Kennedy issued Executive Order 10925 governing federal contracts. That Executive Order contained the first official use of the term "affirmative action" when it required: "the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated, during employment, without regard to their race, creed, color, or national origin." That color-blind vision needs to be restored today.

2. The FCC wrongly proceeds on the assumption that the public interest would be best served by artificial devices intended to lure wealthy minorities into ownership of mass media facilities.

The FCC notes that minorities traditionally have been

Appeals for the District of Columbia Circuit. See Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992). The basis for the court's decision in the Lamprecht case was that the stated goals (diversity in available programming) were not served by the policies of preference for females and that such policies therefore violated the Equal Protection Clause.

Because the primary focus of ALF in this proceeding is the government's power to establish or prevent color-blind public policy, these comments will not further address the FCC's desire to discriminate on the basis of gender as well as race, except to point out the purported justification for the FCC's gender discrimination – lack of access to capital – cannot be justified. The record does not reflect that women lack access to capital. Like other societal groups, including men, the economic resources of women cannot be generalized. Some are wealthy (there are, in fact, more female millionaires than male), some are middle-class, and some are poor. There is no documented, convincing factual premise for the FCC's proposal to favor women investors. Indeed, the NPRM underscores its bias by effectively admitting that it is attempting to "establish that women are underrepresented" (NPRM, p. 6) as the premise for its proposals. To justify its solution, the FCC works to prove that there is a problem.

underrepresented among mass media owners, and it states its belief that "the public interest is served by increasing economic opportunities for minorities and women to own communications facilities." (NPRM, p. 5.) The FCC asserts that its racially discriminatory policies will increase minority ownership, that increased minority ownership will diversify programming. This position invites abuse (as has been seen), and is in need of serious examination.

The FCC statistics show minority "control" of a very small percentage of commercial radio, television, and cable facilities. In fact it is not clear from the Notice of Proposed Rule Making what "minority" or "control" mean in those statistical "showings." Despite a virtual admission that its past racially discriminatory policies have been unsuccessful, there is no explanation by the FCC as to why discrimination is the only way to achieve the desired end. If the effects of the FCC's race-based policies and of minority control are not known, why is the FCC intent on developing additional racially discriminatory practices to increase such control? Why does the FCC jump to create yet further artificial devices, rather than undertake careful study of whether programming diversity can better be obtained in other ways?

The artificiality of the FCC's current policies is exemplified in the lack of any requirement of continuing minority

ownership of a property sold under a tax certificate. Thus, the minority ownership is often transitory. FCC data indicate that from 1979 through 1992, more than 70 percent of radio stations acquired by a minority under the tax certificate policy were later resold by the minority buyer.[12]

Also, there is no requirement that minority buyers commit to any particular "diverse" programming, although diversity in programming is the purported reason for the preference policies. It is easy to see why diversity in programming would not be achieved by virtue of race-based policies, particularly in view of the financial rewards, totally unconnected to program diversity, that are offered.

Now the FCC wants to issue even more tax certificates, and in its Notice of Proposed Rule Making proposes new preferences, supposedly to help minorities and women raise capital, by requiring existing broadcasters to provide low-interest capital to women and minorities as a condition of being allowed to expand (the "incubator" program). Another idea is to waive station ownership limits for members of favored groups. The arguments raised against tax certificates certainly apply with equal force to the proposed incubator programs and waiver of ownership limits for favored investors. Like tax certificates, these are

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[12] See Permanent Extension of Deduction for Health Insurance Costs of Self-Employed Individuals, House Report No. 104-32, 104th Cong., 1st Sess. (1995), p. 15.

artificial devices for investors who are already wealthy. These benefits go to politically-connected investors who know how to "work the system."

3. The existing policies have failed, and the FCC should not propose more of the same.

In 1978, the FCC announced a policy which it said was a "commitment to increasing significantly minority ownership of broadcast facilities."[13] The purported basis for that commitment was an expected increase in programming diversity.

To emphasize a point made above, 17 years have passed, and it is clear that the policy is not working. Minority ownership of broadcast licenses was 0.5 percent in 1978, peaked at 3.0 percent in the mid-1980s, and has declined slightly to 2.9 percent today.[14] What this means is that the FCC's minority-preference polices have been totally ineffective for about ten years, and they may have been ineffective before then. The gain in minority broadcasting ownership through the mid-1980s was more likely due to the record economic expansion due to President Reagan's policies, which dramatically increased minority business ownership of all kinds. More importantly, there has been no showing by the FCC that its policies have helped bring about the

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[13] Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978).

[14] See Permanent Extension of Deduction for Health Insurance Costs of Self-Employed Individuals, House Report No. 104-32, 104th Cong., 1st Sess. (1995), p. 14.

ultimate goal – programming diversity.

Despite a record of failure in its race-preference programs, the FCC nonetheless seeks to continue to expand such misguided policies. The Notice of Proposed Rule Making looks for new ways to prefer some Americans over others on the basis of race and gender. Admitting that its past polices haven't worked, the FCC now questions the American public's intelligence and values by actually asking for suggestions for new preferences. Neither the failure of past preferences nor the overwhelming desire of the American people for color-blind public policy appear to matter to the FCC.

The Abraham Lincoln Foundation, based on its many years of experience in working confronting and combatting the problems of the black community in America, firmly believes that increased minority participation will not result from government favoritism, and certainly not from governmental racism. Minorities will own more broadcast facilities when government policy fosters economic growth for all and removes the burden of over-taxation and over-regulation on small businesses (allowing them to grow), when black and other minority children can choose to attend schools that teach them necessary skills, when welfare policies no longer promote the destruction of the black family and undermining of the work ethic, and when crime no longer drives businesses and jobs out of the cities. Otherwise, as is

all too often the case, government is more likely to be part of the problem than part of the solution.

4. There is no demonstrated connection between FCC preference polices and their stated purposes.

There is no meaningful discussion in the FCC Notice of Proposed Rule Making about the current state of programming diversity, or whether past policies of the FCC to bring about greater programming diversity have been successful. Instead, the FCC appears rigidly committed to increasing racial preferences without any attempt to evaluate the impact of past programs. The Abraham Lincoln Foundation submits that the focus of this rulemaking should be on the propriety of any FCC policy based on preference by race - not on new ways to implement suspect and failed policies that mock fundamental Constitutional protections.

The FCC has never defined minority programming. Nor has the FCC established that minority-owned stations broadcast more minority programming, however it may be defined. No studies have identified what is an optimal (or even minimally appropriate) type or level of minority or female programming on the air. According to Jorge Reina Schement, communications professor at Rutgers University, "[c]ontent analyses done over the last fifteen years show really very small differences. [Minority-owned stations] operate in the same marketplace everyone else

operates in."[15] George Washington University's Christopher H. Sterling agrees, stating "[w]hat research has been done so far comes up showing no significant difference."[16]

The concept that undercapitalized minority investors, if assisted in getting into broadcasting, will carry more diverse programming is logically flawed. The market determines programming, and the minority broadcaster must present programming that draws an audience. What profitable programming do broadcasters now refuse? If programming is insufficiently "diverse" now, is it for lack of market demand? If there is limited market demand for "diverse" programming, will minority broadcasters be more willing to lose money than non-minorities on undesired programming? If minority broadcasters are inadequately capitalized, how can they afford to lose money on "diverse" programming? It is probably for these and similar reasons that the FCC has no current data to show that existing minority broadcasters provide more "diverse" programming than others.

In 1994, the FCC undercut the credibility of its "programming diversity" rationale when it extended such preference policies to personal communications services (PCS), such as two-way pagers and interactive video. The owners of

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[15] "Color TV: Diversity-Mongering at the FCC," The New Republic, December 19, 1994, p. 9.

[16] "Color TV: Diversity-Mongering at the FCC," The New Republic, December 19, 1994, p. 9.

paging or interactive video services do not originate or broadcast programming, just as the local telephone company does not originate programming. With the "programming diversity" fig leaf dropped, it is obvious that the FCC is practicing discrimination for discrimination's sake.[17]

In short, the FCC policies purport to help minorities, but are simply a costly welfare program for the wealthy. After all, there is no way the policies could be helpful when they are based on crude racial stereotypes, such as the following:

- That all members of a minority group think alike.
- That race or ethnicity determines how people act or think.
- That there is a distinct black view, a Hispanic view, an Asian view, a women's view.
- That citizens are components of a racial class rather than individuals.
- That differences in race should be relevant to a person's right to participate in a free and democratic society.

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[17] In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell (with four justices concurring) wrote:

> If [the University's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. [438 U.S. at 307.]

(That belief takes us to absurd lengths. In Storer Broadcasting Co., 87 F.C.C.2d 190 (1981), the FCC had to trace an applicant's family history back to 1492 to conclude that he was Hispanic.)

- That someone who owns a radio or television station or a cable system will select programming based on his skin color, rather than audience preferences.

Justice Clarence Thomas eloquently spoke for millions of Americans when he attacked such racial stereotyping in Holder v. Hall, 114 S.Ct. 2581 (1994), a case brought under the Voting Rights Act:

> We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own "minority preferred" representatives holding seats if they are to be considered represented at all.... The assumptions upon which our...decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution. [114 S.Ct. at 2597-98.]

The FCC's racial stereotyping has led it to determine that the American public does not receive the right mix of broadcast and cable programming, and that the government needs to fix it. But the FCC has never measured or quantified the programming that is provided – or that is missing. There is no factual showing that any kind of programming for which a supportable public demand exists is not available.

Even if we were to assume that certain kinds of needed programming are now missing from the airwaves or cable systems, the FCC has failed to explain why its preferences should not be tied to broadcasters who agree to supply the missing programming, and thereby avoid racial discrimination. If programming diversity were the real goal, the FCC would create policies tailored to that goal, not race-based policies that only benefit the wealthy. With no current factual information to show a connection between a broadcaster's race or gender and a result of programming diversity, either on a case-by-case basis or generically, the FCC's assertion that race-based policies will lead to greater programming "diversity" is simply a pretext for discriminating for the sake of discrimination.

The FCC's racial stereotypes harm minorities with their strong message of racial inferiority. Minorities see their thoughts and efforts, work and worth, evaluated on the basis of skin color, instead of individual effort, achievement, character or merit. Racial animosities arise from members of disfavored races who have never themselves discriminated. Preferences become a burden, not an advantage, to minorities – raising doubts about the competence of anyone who succeeds on his own experience, ability and hard work. But many blacks succeed the old-fashioned way, in many fields.

Are we to be made a nation divided into separate racial

blocs? Do we want our Constitution's equal protection guarantees to extend equally to all citizens? The FCC can become part of the solution, instead of being part of the problem.

5. The proposed economic incentives designed to attract minorities to mass media ownership should be evaluated by considering the harm to the public interest if race-based preferences are adopted.

The FCC admits it lacks data, including any meaningful statistics, studies, or internal evaluations, on the effectiveness of its race-based policies designed to promote minority ownership of mass media facilities. It has requested comments on the projected impact of such proposals. (See NPRM, pp. 22-23.) The Abraham Lincoln Foundation submits that the scope of such comments should not be limited to the comparatively narrow issues outlined by the FCC. Truly important issues include:

- whether any such incentives should be offered based upon racial considerations, in light of the impact of such race-based preferences on the public interest; and
- whether the incentives, if adopted, would in fact achieve diversity of programming.

But these overriding concerns have no apparent place in the FCC's deliberations. This is a tragic oversight, and is one that the FCC should take steps to correct.

It is important to note that the Supreme Court upheld two FCC minority preference policies that were challenged in Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990), because - and only because - it was determined that such policies accomplished an important governmental objective - the promotion of program diversity. In the absence of a finding that such racial classifications served important governmental objectives and were substantially related to the accomplishment of those objectives, the result presumably would have been different. See id., at 564-66. To the arguments set forth in the powerful dissent in that case, therefore, must be added the admonition that whether the minority preference policies "work" is of fundamental importance in determining their constitutionality. If they do not work - and the record appears to support that conclusion at this point - such policies lose whatever evidentiary support once linked them to acceptance by the Supreme Court. If they do not work, they cannot be considered related to the accomplishment of the governmental objectives (which showing was critical to sustain the discriminatory measures in the first place).

An example of the legal result when such minority preference policies do not work is found in Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), where the court of appeals, fully cognizant of the Metro Broadcasting standards, held that there was insufficient evidentiary support to establish a nexus between the FCC's gender-preference policies and their purported goal of